

BINGHAM

EX PARTE OR LATE FILED

REDACTED - FOR PUBLIC INSPECTION

Nguyen T. Vu  
Direct Phone: (202) 373-6254  
Direct Fax: (202) 373-6001  
nguyen.vu@bingham.com

FILED/ACCEPTED

NOV 29 2007

Federal Communications Commission  
Office of the Secretary

VIA HAND DELIVERY AND ECFS

November 29, 2007

Marlene H. Dortch, Secretary  
Office of the Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Suite 5-C327  
Washington, DC 20554

ORIGINAL

**Re: *Ex Parte*, Petitions of the Verizon Telephone Companies  
for Forbearance Pursuant to 47 U.S.C. § 160(c) in the  
Boston, New York, Philadelphia, Pittsburgh, Providence  
and Virginia Beach Metropolitan Statistical Areas, WC  
Docket No. 06-172**

Dear Secretary Dortch:

In accordance with the Second Protective Order in the above-referenced proceeding,<sup>1</sup> enclosed for filing are two copies of the redacted version of the attached letter being submitted by 18 CLECs.

Under separate cover and in accordance with the Second Protective Order in this proceeding,<sup>2</sup> copies of the Highly Confidential Information are being submitted to you along with Gary Remondino, Jeremy Miller and Tim Stelzig of the Wireline Competition Bureau.

To the extent any party wishes to access the Highly Confidential Information associated with this filing, it should send its request in writing to Christine Johnson (christine.johnson@bingham.com) and Nguyen Vu (nguyen.vu@bingham.com) along with executed Acknowledgments of Confidentiality associated with the Second Protective Order.

<sup>1</sup> *Petitions of the Verizon Telephone Companies for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New York, Philadelphia, Pittsburgh, Providence and Virginia Beach Metropolitan Statistical Areas*, WC Docket No. 06-172, Order, 22 FCC Rcd 892, DA 07-208, ¶ 15 (WCB rel. Jan. 25, 2007) ("Second Protective Order").

<sup>2</sup> *Id.*

Boston  
Hartford  
Hong Kong  
London  
Los Angeles  
New York  
Orange County  
San Francisco  
Santa Monica  
Silicon Valley  
Tokyo  
Walnut Creek  
West Valley

Bingham McCutchen LLP  
2020 K Street NW  
Washington, DC  
20006-1806

202.373.6000  
202.373.6001  
bingham.com

No. of Copies rec'd  
List ABCDE

0

**REDACTED-FOR PUBLIC INSPECTION**

Marlene H. Dortch, Secretary  
November 29, 2007  
Page 2

Also enclosed is an extra copy of this redacted filing, please date stamp and return it to the courier. Should you have any questions about this filing, please contact me.

Sincerely,

/s/  
Nguyen T. Vu

Enclosure

**REDACTED FOR PUBLIC INSPECTION**

Andrew D. Lipman  
Russell M. Blau  
Philip J. Macres  
Direct Phone: 202.373.6000  
Direct Fax: 202.373.6001  
andrew.lipman@bingham.com  
russell.blau@bingham.com  
philip.macres@bingham.com

November 29, 2007

**VIA HAND DELIVERY AND ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 Twelfth Street, SW  
Washington, DC 20554

**Re: *Ex Parte*, Petitions of the Verizon Telephone Companies for  
Forbearance Pursuant to 47 U.S.C. § 160(c) in the Boston, New  
York, Philadelphia, Pittsburgh, Providence and Virginia Beach  
Metropolitan Statistical Areas, WC Docket No. 06-172**

Dear Ms. Dortch:

The undersigned carriers respond to Verizon's November 28, 2007 *ex parte* filing, purporting to clarify the market share calculations it submitted on November 16.<sup>1</sup> This latest submission continues Verizon's consistent practice throughout this proceeding of manipulating statistics to mislead the Commission and misrepresenting the extent of market share loss to facilities-based competitors in the six MSAs.

Our November 20 *ex parte* letter<sup>2</sup> pointed out the flaws in Verizon's methodology, and the same problems are inherent in its November 28 revised calculations (which also introduce new distortions). Since we have already addressed these issues at length, we briefly summarize the problems in Verizon's latest calculations below:<sup>3</sup>

---

<sup>1</sup> Letter from Evan T. Leo, outside counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 28, 2007) ("Verizon November 28 *Ex Parte*").

<sup>2</sup> Letter from Andrew D. Lipman *et al.* to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 20, 2007).

<sup>3</sup> As discussed in our November 20 letter, the undersigned carriers do not believe that the analysis employed in the Omaha and Anchorage decisions is sufficient to protect

**REDACTED FOR PUBLIC INSPECTION**

Marlene H. Dortch, Secretary  
November 29, 2007  
Page 2

1) Verizon admitted in its November 16 letter<sup>4</sup> that it understated its own market share by comparing its residential line count to its competitors' E911-based telephone numbers counts. In its November 28 filing, Verizon's totals for competitors mix together line counts provided by some cable companies and E911-based counts for other competitors, making it impossible to determine which numbers are which. However, the November 16 filing implies that the E911 counts were overstated (or, conversely, Verizon's line counts were understated) by approximately **[Begin Confidential]** **[End Confidential]** percent, depending on the MSA.

2) Although Verizon's November 28 letter acknowledges the inclusion of switched wholesale lines in its calculation of competitive market share, it neglects to mention that it also includes UNE loops purchased by Cavalier in the Philadelphia and Virginia Beach MSAs for residential service in its count of "facilities-based" competitors.<sup>5</sup> The Commission expressly rejected this approach in the *Omaha Forbearance Order*, para. 68, as we previously noted.<sup>6</sup> The Cavalier UNE loops should be counted as Verizon-provided lines, in keeping with the Omaha precedent.

3) Verizon seeks to justify treating resale of Verizon switched services (including its ironically-named "Wholesale Advantage" offering) as facilities-based competition by citing the *Omaha Forbearance Order*, para. 62, and the *Anchorage Forbearance Order*, para. 30.<sup>7</sup> These citations are inapposite. In fact, in the Omaha

---

the public interest, nor to ensure that the statutory forbearance standards are satisfied. Nonetheless, *even if* the Omaha and Anchorage decisions were the sole criteria to be applied here, Verizon would not be entitled to forbearance.

<sup>4</sup> Letter from Evan T. Leo, outside counsel for Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 06-172 (filed Nov. 16, 2007) at 10 & Attachment D.

<sup>5</sup> Cavalier is the only UNE-based carrier whose E911 listing counts are specifically identified in the residential calculations in Exhibit 3 to Verizon's Reply Comments in this docket, but it is possible that there are other UNE loops used to serve residential customers in the six MSAs that we cannot account for at this time improperly included in Verizon's calculation of the CLEC market share.

<sup>6</sup> *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-223, Memorandum Opinion and Order, 20 FCC Rcd 19415 (2005) ("*Omaha Forbearance Order*"), *petitions for review denied in part, dismissed in part, Qwest Corp. v. FCC*, 482 F.3d 471 (D.C. Cir. 2007).

<sup>7</sup> *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and*

**REDACTED FOR PUBLIC INSPECTION**

Marlene H. Dortch, Secretary  
November 29, 2007  
Page 3

decision, the Commission *first* considered the extent of residential competition provided over Cox's own independent facilities; *see Omaha Forbearance Order*, paras. 65-66. Only *after* finding a threshold level of competition provided over these facilities did the Commission also consider, as a secondary factor, the provision of switched and non-switched wholesale services by Qwest. *Id.*, para. 67. In Anchorage, similarly, the Commission examined the extent of competition over GCI's own facilities (*Anchorage Forbearance Order*, para. 28) as a threshold issue, before considering competition using resold services (para. 30).

4) Verizon's November 28 letter also provides an alternative calculation of market share excluding switched wholesale lines. However, Verizon distorts this calculation by excluding these lines from *both* the numerator and the denominator of its calculations. In other words, it computed Verizon's share of the *portion* of the market that excludes customers served over switched wholesale lines, which is a meaningless number. Switched wholesale lines must either count as facilities-based competition (which would be absurd) or as Verizon-provided services. They cannot be treated as if they do not exist.

5) Verizon's November 28 letter, like its earlier submission, includes estimated "cut-the-cord" wireless connections and "over-the-top VoIP" connections as part of the competitive market share. As previously noted, the Commission refused to consider such data in both the *Omaha* and *Anchorage* decisions, and the evidence submitted by Verizon here is no more reliable than the data rejected in those cases.

To illustrate the magnitude of these errors, Attachment A to this letter, and Figure 1 below, present three alternative calculations of Verizon's market share. The top portion of the spreadsheet presents the raw data, copied or derived from Verizon's November 28 letter and Exhibits 1 and 3 to its Reply Comments in this docket.<sup>8</sup> The bottom portion shows several adjustments to Verizon's claimed market share, starting with the (already high) market shares acknowledged by Verizon in its November 28 letter.

---

252(d)(1) in the Anchorage Study Area, WC Docket No. 05-281, Memorandum Opinion and Order, 22 FCC Rcd 1958, ¶ 28 (2007) ("*Anchorage Forbearance Order*"), *appeals dismissed*, *Covad Communications Group, Inc. v. FCC*, Nos. 07-70898, 07-71076, 07-71222 (9th Cir. 2007).

<sup>8</sup> The undersigned carriers use Verizon's data solely to permit direct comparisons between calculations, not to suggest that Verizon's data is accurate or reliable.

**REDACTED FOR PUBLIC INSPECTION**

Marlene H. Dortch, Secretary  
November 29, 2007  
Page 4

**[Begin Highly Confidential]**

**[End Highly Confidential]**

The first alternative calculation simply adds Cavalier's UNE loops back into Verizon's market share, as required by the Omaha precedent. Since these loops are in fact provisioned by Verizon they certainly cannot be counted as a source of facilities-based competition. This adjustment, which applies only to the Philadelphia and Virginia Beach markets, shows that Verizon's actual market share exceeds **[Begin Highly Confidential]** **[End Highly Confidential]** percent in each of the six MSAs.

The second adjustment removes "cut-the-cord wireless" and "over-the-top VoIP" connections from the market share computations. Consistent with the Commission's analysis in the Omaha and Anchorage proceedings, these estimates (which were not very reliable in any event) are not included in either the numerator or the denominator. After this adjustment, Verizon's market share is increased to over **[Begin Highly Confidential]** **[End Highly Confidential]** percent in each of the six MSAs.

The third adjustment adds switched wholesale residential lines back into Verizon's market share. Like UNE loops, these are services provisioned by Verizon over Verizon facilities, and cannot rationally be included in any computation of facilities-based competitive market share. This calculation, which is most consistent with the

**REDACTED FOR PUBLIC INSPECTION**

Marlene H. Dortch, Secretary  
November 29, 2007  
Page 5

methodology actually employed by the Commission in measuring market shares in both Omaha and Anchorage, reveals that Verizon's residential market share is over **[Begin Highly Confidential] [End Highly Confidential]** percent in each of the six MSAs, and much higher in some markets.

In sum, Verizon's November 28 calculations are just another attempt to disguise the plain fact that competition in the six MSAs at issue here has not risen to anywhere near the levels considered by the Commission in Omaha and Anchorage.

Respectfully submitted,

*/s/ Russell M. Blau*

---

Andrew D. Lipman  
Russell M. Blau  
Philip J. Macres  
BINGHAM MCCUTCHEEN, LLP  
2020 K Street, NW  
Washington, DC 20006

*Attorneys for*

Alpheus Communications, L.P.;	MegaPath, Inc.
ATX Communications, Inc.;	Mpower Communications Corp.;
Cavalier Telephone Corporation;	Norlight Telecommunications, Inc.;
CloseCall America, Inc.;	Penn Telecom, Inc.;
DSLnet Communications, LLC;	RCN Telecom Services, Inc.;
Eureka Telecom, Inc. d/b/a	RNK Inc.;
InfoHighway Communications;	segTEL, Inc.;
ITC^DeltaCom Communications, Inc.;	Talk America Holdings, Inc.;
McLeodUSA Telecommunications	TDS Metrocom, LLC; and
Services, Inc.;	U.S. TelePacific Corp. d/b/a
	TelePacific Communications

cc: Scott Bergmann (redacted version only via e-mail)  
Scott Deutchman (redacted version only via e-mail)  
Ian Dillner (redacted version only via e-mail)  
John Hunter (redacted version only via e-mail)  
Chris Moore (redacted version only via e-mail)  
Dana Shaffer (redacted version only via e-mail)  
Jeremy Miller (via e-mail)  
Tim Stelzig (via e-mail)  
Dan Remondino (2 paper copies)  
Janice Myles (redacted version only via e-mail)  
Berry Best and Printing (redacted version only via e-mail)

REDACTED FOR PUBLIC INSPECTION

ATTACHMENT A

A	B	C	D	E	F = B+C+D	G	H	I = F+G+H
MSA	VZ/MCI Retail Residential	Switched Wholesale	Competitive Residential/ Mass Market (Cable & Facilities- Based CLEC)	Cavalier Residential UNEs	Total Mass- Market Voice Connections (Excluding Wireless or Over-the-Top VoIP)	Est. Wireless- Only Households	Est. Over-the- Top VoIP Subscribers	Total Mass- Market Voice Connections Including Wireless and Over-The-Top VoIP
Boston	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
New York	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
Philadelphia	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
Pittsburgh	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
Providence	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED
Virginia Beach	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED	REDACTED

Verizon's Market Share

	B/I	(B+E)/I	(B+E)/F	(B+C+E)/F
MSA	Claimed in Nov. 28 ex parte	Excluding Residential UNEs	Excluding Wireless, Over-the-Top VoIP, and Residential UNEs	Excluding Wholesale, Wireless, VoIP and UNEs
Boston	REDACTED	REDACTED	REDACTED	REDACTED
New York	REDACTED	REDACTED	REDACTED	REDACTED
Philadelphia	REDACTED	REDACTED	REDACTED	REDACTED
Pittsburgh	REDACTED	REDACTED	REDACTED	REDACTED
Providence	REDACTED	REDACTED	REDACTED	REDACTED
Virginia Beach	REDACTED	REDACTED	REDACTED	REDACTED